

Buddy Garcia, *Chairman*  
Larry R. Soward, *Commissioner*  
Bryan W. Shaw, Ph.D., *Commissioner*  
Glenn Shankle, *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

February 21, 2008

LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
Attention: Docket Clerk, MC 105  
P.O. Box 13087  
Austin, Texas 78711-3087

CHIEF CLERKS OFFICE

2008 FEB 21 PM 4:14

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

Re: Enforcement Action  
Advantage Asphalt Products, Ltd.  
TCEQ Docket No. 2007-0768-AIR-E  
SOAH Docket No. 582-08-0523

Dear Ms. Castañuela:

Enclosed please find a copy of the "Executive Director's Response to the Exceptions filed by Advantage Asphalt Products, Ltd." regarding the above-referenced matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Kathleen C. Decker".

Kathleen C. Decker  
Attorney  
Litigation Division

Enclosures

cc: Mr. Brian R. Smith, Attorney for Advantage Asphalt Products, Ltd.  
Mr. Scott Knutson, Registered Agent for Advantage Asphalt Products, Ltd.  
Bryan Elliott, Air Enforcement Section, TCEQ, MC 149  
TCEQ Chief Clerk, MC-105  
Blas Coy, Office of the Public Interest Counsel, MC-103

Buddy Garcia, *Chairman*  
Larry R. Soward, *Commissioner*  
Bryan W. Shaw, Ph.D., *Commissioner*  
Glenn Shankle, *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

February 21, 2008

**Via Facsimile Transmission: (512) 475-4994**  
**and First Class Mail, postage pre-paid**

Honorable Stephen J. Pacey  
Administrative Law Judge  
State Office of Administrative Hearings  
300 West 15<sup>th</sup> Street, Suite 502  
Austin, Texas 78711

Re: Advantage Asphalt Products, Ltd.  
SOAH Docket No. 582-08-0523  
TCEQ Docket No. 2007-0768-AIR-E

Dear Judge Pacey:

Enclosed please find a copy of the "Executive Director's Response to the Exceptions filed by Advantage Asphalt Products, Ltd." regarding the above-referenced matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kathleen C. Decker".

Kathleen C. Decker  
Attorney  
Litigation Division

Enclosures

cc: Mr. Brian R. Smith, Attorney for Advantage Asphalt Products, Ltd.  
Mr. Scott Knutson, Registered Agent for Advantage Asphalt Products, Ltd.  
Bryan Elliott, Air Enforcement Section, TCEQ, MC 149  
TCEQ Chief Clerk, MC-105  
Blas Coy, Office of the Public Interest Counsel, MC-103

CHIEF CLERKS OFFICE

2008 FEB 21 PM 4:14

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

SOAH DOCKET NO. 582-08-0523  
TCEQ DOCKET NO. 2007-0768-AIR-E

THE EXECUTIVE DIRECTOR OF  
THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY,  
Petitioner

v.

ADVANTAGE ASPHALT PRODUCTS,  
LTD.;  
Respondent

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§

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARING

CHIEF CLERKS OFFICE

2008 FEB 21 PM 4:14

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

**EXECUTIVE DIRECTOR'S RESPONSE TO THE EXCEPTIONS FILED BY  
ADVANTAGE ASPHALT PRODUCTS, LTD.**

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY:

COMES NOW the Executive Director of the Texas Commission on Environmental Quality ("Commission") represented by the Litigation Division. After having reviewed the Exceptions filed by Advantage Asphalt Products, Ltd. to the Administrative Law Judge's Proposal for Decision (PFD) and Default Order, the Executive Director respectfully files the following response:

**I.**

Advantage Asphalt Products, Ltd. hereinafter referred to as "AAP" failed to appear at the preliminary hearing set for December 6, 2007 and wholly made default as to the violations and administrative penalty amount. In its Exceptions, AAP does not contest the fact that it received proper notice of the proceeding. The respondent does however, claim that its "representative" mistakenly believed the preliminary hearing set for December 6, 2007 at 10:00 a.m. was also continued when the Administrative Law Judge (ALJ) granted AAP's Motion for Continuance filed in a second case under SOAH Docket No. 582-04-8905 and TCEQ Docket No. 2003-1310-AIR-E which had been set for an evidentiary hearing on December 6, 2007.

Mr. Smith, who is now counsel of record in this case after filing AAP's Exceptions, was retained on August 13, 2007 to represent AAP in the evidentiary hearing under TCEQ Docket No. 2003-1310-AIR-E and SOAH Docket No. 582-04-8905 which had been previously set for September 25, 2007 at SOAH. Mr. Smith then filed a motion for continuance a month later on September 10, 2007 representing that he needed more time for preparation and had a scheduling conflict. The ALJ granted his motion and the case was reset for December 6, 2007. When it was time for the December hearing, Mr. Smith filed another motion for continuance; this time claiming a witness was unavailable. Mr. Smith filed the motion for continuance late on the day before Thanksgiving so counsel for the Executive Director, Mr. Alfred Oloko, was not consulted, nor did he have the opportunity to respond prior to the ALJ granting the continuance and the case was reset yet again.

## II.

It can be argued that since Mr. Smith had not entered an appearance as the attorney of record for AAP in this case he is not responsible for AAP not appearing at the preliminary hearing because AAP was "pro se" in the matter. However, Mr. Smith had been AAP's attorney in the other enforcement case since August of last year. It is inconceivable that he was not aware of the preliminary hearing set for this case or that he could believe or allow his client to believe that when the ALJ granted his continuance in the other matter it automatically continued this case. No attorney would make a mistake like that. The docket numbers for the cases are different, the times and courtrooms for the hearings were different and they involved different violations. The cases even had two different attorneys representing the Executive Director and separate notices had been sent by the TCEQ Chief Clerk's Office.

## III.

It is evident that AAP has been stalling the enforcement process. This is well documented by the Executive Director's struggle to get both cases to a hearing at SOAH and when hearings are set, continuances are requested by AAP—or they simply don't show, wait for the Proposal for Decision to be issued, and then request that the matter be returned for a hearing knowing that it will take some time for the matter to be placed on the Commissioners' agenda for the Commissioners to address.

At various agendas the Commissioners have expressed a desire for enforcement cases to proceed to more timely resolutions. The Executive Director was questioned as to whether there was anything that he could do with respondents that ignore the enforcement action or deliberately delay the process with conscious indifference to the consequences. Such is the problem with this case.

Due process requires that AAP be given notice of the violations and an opportunity to defend itself in a judicial forum. The Executive Director gave that opportunity to AAP, but it chose not to appear and has thus suffered the consequences of its delay tactics. It is respectfully requested that the Commissioners deny AAP's request to return the matter to SOAH for another hearing and adopt the ALJ's PFD as amended by the Exceptions filed by the Executive Director on February 11, 2008. AAP also filed its Exceptions on February 11, 2008. After receiving the Executive Director's Exceptions, Judge Pacey by letter of February 14, 2008 wrote that "with the changes made by the Executive Director the PFD and Order correctly and equitably apply the applicable statutes and promulgated rules to the facts set for the in the evidentiary record."

Respectfully submitted,

Texas Commission on Environmental Quality

Glenn Shankle  
Executive Director

Stephanie Bergeron Perdue  
Deputy Director  
Office of Legal Services

Mary R. Risner  
Director  
Litigation Division

by:

A handwritten signature in black ink, appearing to read 'Kathleen C. Decker', written over a horizontal line.

Kathleen C. Decker  
State Bar of Texas No. 05630500  
Litigation Division, MC 175  
P.O. Box 13087  
Austin, Texas 78711-3087  
(512) 239-6500  
(512) 239-3434 (FAX)

**CERTIFICATE OF SERVICE**

I hereby certify that on this the 21st day of February, 2008, the original of the foregoing "Executive Director's Response to the Exceptions filed by Advantage Asphalt Products, Ltd." (Response) was filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas. I further certify that on this day a true and correct copy of the foregoing Response was sent to the following in the manner indicated:

**Via Facsimile Transmission: (512) 475-4994**  
**and First Class Mail, postage pre-paid**

Honorable Stephen J. Pacey  
Administrative Law Judge  
State Office of Administrative Hearings  
300 West 15<sup>th</sup> Street, Suite 502  
Austin, Texas 78711

**Via Certified Mail, Return Receipt Requested**  
**Article No. 7004 2510 0003 9118 1174**  
**and Facsimile Transmission: (806) 374-3980**

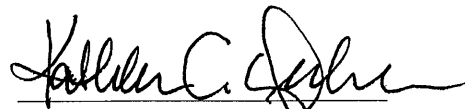
Mr. Brian R. Smith  
Attorney at Law  
Amarillo Building  
P.O. Box 9134  
Amarillo, Texas 79104-9134

**Via Certified Mail, Return Receipt Requested**  
**Article No. 7004 2510 0003 9118 1181**

Mr. Scott Knutson  
Registered Agent and President  
Advantage Asphalt Products, Ltd.  
P.O. Box 50353  
Amarillo, Texas 79159

**Via Hand Delivery**

Mr. Blas Coy, Jr., Attorney  
Office of Public Interest Counsel, MC-103  
Texas Commission on Environmental Quality  
Austin, Texas 78711-3087



Kathleen C. Decker  
Attorney  
Litigation Division  
Texas Commission on Environmental Quality

SOAH DOCKET NO. 582-08-0523  
TCEQ DOCKET NO. 2007-0768-AIR-E

THE EXECUTIVE DIRECTOR OF  
THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY,  
Petitioner

v.

ADVANTAGE ASPHALT PRODUCTS,  
LTD.;  
Respondent

BEFORE THE STATE OF

OF

ADMINISTRATIVE HEARINGS

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2008 FEB 11 PM 4:19  
CHIEF CLERKS OFFICE

**EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE ADMINISTRATIVE LAW  
JUDGE'S PROPOSAL FOR DECISION AND ORDER**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE STEPHEN J. PACEY:

COMES NOW the Executive Director of the Texas Commission on Environmental Quality ("Commission") represented by the Litigation Division. After having reviewed the Administrative Law Judge's Proposal for Decision and Default Order, the Executive Director respectfully files the following exceptions to the proposed Default Order:

**I.**

The Executive Director respectfully recommends that a Conclusion of Law be added to the Default Order to reflect the enforcement authority of the Commission as Conclusion of Law No. 1 and the remaining Conclusions of Law be renumbered beginning with Conclusion of Law No. 2. The Executive Director respectfully recommends that the sentence, "The Respondent is subject to the Commission's enforcement authority pursuant to TEX. WATER CODE §§ 5.013 and 7.002" be added to the Default Order as Conclusion of Law No. 1.

**II.**

The Executive Director respectfully recommends that § 80.6 found in the first sentence of Conclusion of Law No. 5 (which is requested to be re-numbered as No. 6) be revised to include the full citation of 30 TEX. ADMIN. CODE § 80.6(b)(3) and that the sentence also contain a reference to 30 TEX. ADMIN. CODE § 1.12. The sentence should then read as follows: "As required by TEX. GOV'T CODE ANN. § 2001.052; TEX. WATER CODE ANN. § 7.058; 1 TEX. ADMIN. CODE § 155.27, and 30 TEX. ADMIN. CODE §§ 1.11, 1.12, 70.104 and 80.6(b)(3), Respondent was notified of the hearing on the alleged violations and proposed penalties."

III.

The Executive Director respectfully recommends that the reference to 30 Tex. Admin. Code §§ 70.106(b) and 80.113(d) be revised to correct the font to small caps instead of small letters in the second sentence of Conclusion of Law No. 5 (which is requested to be re-numbered as No. 6). The sentence should then read as follows: "Additionally, Respondent was notified, in accordance with 1 TEX. ADMIN. CODE § 155.55 and 30 TEX. ADMIN. CODE §§ 70.106(b) and 80.113(d), that if Respondent failed to appear at the hearing, a default judgment could be rendered against Respondent in which all the allegations contained in the notice of hearing would be deemed admitted as true."

IV.

The Executive Director respectfully requests that Ordering Provision No. 5 in the proposed Default Order be revised to delete "Respondent" and add "all parties." The sentence should be changed to: "As required by TEX. WATER CODE § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to all parties."

Respectfully submitted,

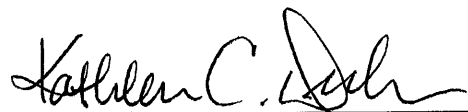
Texas Commission on Environmental Quality

Glenn Shankle  
Executive Director

Stephanie Bergeron Perdue  
Deputy Director  
Office of Legal Services

Mary R. Risner  
Director  
Litigation Division

by:



Kathleen C. Decker  
State Bar of Texas No. 05630500  
Litigation Division, MC 175  
P.O. Box 13087  
Austin, Texas 78711-3087  
(512) 239-6500  
(512) 239-3434 (FAX)



**CERTIFICATE OF SERVICE**

I hereby certify that on this the 11th day of February, 2008, the original of the foregoing "Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision and Order" (Exceptions) were filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas. I further certify that on this day a true and correct copy of the foregoing Exceptions were sent to the following in the manner indicated:

**Via Facsimile Transmission: (512) 475-4994**  
**and First Class Mail, postage pre-paid**

Honorable Stephen J. Pacey  
Administrative Law Judge  
State Office of Administrative Hearings  
300 West 15<sup>th</sup> Street, Suite 502  
Austin, Texas 78711

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**and Facsimile Transmission: (806) 374-3980**

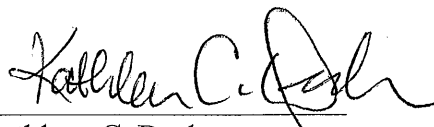
Mr. Brian R. Smith  
Attorney at Law  
Amarillo Building  
P.O. Box 9134  
Amarillo, Texas 79104-9134

**Via Certified Mail, Return Receipt Requested**  
**Article No. 7004 2510 0003 9118 1136**

Mr. Scott Knutson  
Registered Agent  
Advantage Asphalt Products, Ltd.  
P.O. Box 50353  
Amarillo, Texas 79159

**Via Hand Delivery**

Mr. Blas Coy, Jr., Attorney  
Office of Public Interest Counsel, MC-103  
Texas Commission on Environmental Quality  
Austin, Texas 78711-3087



Kathleen C. Decker  
Attorney  
Litigation Division